

## COMBATANT DETERMINATION IN THE ASYMMETRIC ENVIRONMENT

BY

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## **ABSTRACT**

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In January 2009, President Barack Obama directed both the immediate establishment of a Special Interagency Task Force on Detainee Disposition and the closure of the Guantanamo Bay Detention Facility by January 2010. As the Special Task Force works quickly to develop the options for detention, trial, transfer, or release of enemy personnel currently in United States custody, it must consider the ramifications of each recommendation for Americans captured in peace and wartime situations worldwide. This paper will explore America's contributions to the evolution of the Geneva Conventions and why the combatant status determination issue exists. Secondly, it will examine the applicability of the Conventions to future security environments and unconventional capture situations faced by American citizens. Following an analysis of current United States and international policy on combatant determination and treatment, this study will provide recommendations to prosecute the War on Terror adversaries while enhancing the survivability of, and protections afforded to, Americans captured abroad.





## COMBATANT DETERMINATION IN THE ASYMMETRIC ENVIRONMENT

The United States also remains steadfastly committed to upholding the Geneva Conventions, which have been the bedrock of protection in armed conflict for more than 50 years. These Conventions provide important protections designed to reduce human suffering in armed conflict. We expect other nations to treat our service members and civilians in accordance with the Geneva Conventions. Our Armed Forces are committed to complying with them and to holding accountable those in our military who do not.

—President George W. Bush<sup>1</sup>

On September 20, 2001, during an address to a joint session of Congress and the American people, former President George W. Bush officially committed the United States to a global “war on terror (WOT)” starting with Al Qaeda terrorists and the Taliban regime in Afghanistan, and not ending “...until every terrorist group of global reach has been found, stopped, and defeated... any nation that continues to harbor or support terrorism will be regarded...as a hostile regime.”<sup>2</sup> The President’s words quickly turned into actions on 7 October 2001 as the United States and its allies initiated Operation ENDURING FREEDOM against Al Qaeda training camps and Taliban military installations in Afghanistan.<sup>3</sup> With the WOT declaration and subsequent use of Department of Defense (DOD) forces, the United States shifted its pursuit of Al Qaeda and the Taliban from the international civilian criminal realm to an offensive engagement in a declared international armed conflict with a non-state, transnational actor and a state/non-state sponsor of terrorist organizations. This shift calls into question if and how the traditional international laws of armed conflict (LOAC) apply to the WOT. International law, also referred to as the law of nations or *jus gentium*, directs the actions of states and international organizations through either treaty agreements or customary practices considered legally binding.<sup>4</sup> The WOT, by nature, does not easily fit

within the LOAC paradigm, which primarily address conventional state-on-state armed conflicts. The classification of captured enemy personnel, as currently stipulated within the Hague Regulations and Geneva Conventions, still presents a significant challenge.

By the end of November 2001, the United States Armed Forces captured and detained a significant numbers of individuals believed at the time to be members of either Al Qaeda or the Taliban.<sup>5</sup> The ensuing confusion over combatant-noncombatant status forced the United States government to reassess the existing guidance and policies on the classification and treatment of enemy personnel held at the Guantanamo Bay Detention Facility in Cuba. Although the legal status and standards of treatment for captured enemy forces participating in conventional conflicts are well defined, the international legal community has not fully addressed the many new issues concerning detained personnel in asymmetric warfare. As the United States struggle to determine the legal status, rights, and standards of treatment for captured personnel enters into its eighth year, one must consider the long term impacts of pursuing an unending WOT. Of particular concern, harsh international criticism of the current United States processes for handling WOT detainees may produce substantial negative consequences for American personnel<sup>6</sup> captured while serving abroad.

On January 22, 2009, President Barack Obama signed Executive Orders directing the immediate establishment of a Special Interagency Task Force on Detainee Disposition,<sup>7</sup> to find a solution that balances the needs of national security with the human right to justice, and the closure of the Guantanamo Bay Detention Facility no later than 22 January 2010.<sup>8</sup> As the Special Task Force works over the next nine months to develop the options for detention, trial, transfer, or release of all WOT enemy

personnel currently in United States custody, it must consider the ramifications of each recommendation for Americans captured in peace and wartime situations.

This study will first examine America's contributions to the evolution of the Geneva Conventions and why the combatant status determination issue exists. Secondly, one must explore the applicability of the Conventions to future security environments and unconventional capture situations faced by American citizens. Following an analysis of current United States and international policy on combatant determination and treatment, this paper will provide recommendations to pursue the WOT adversaries while enhancing the survivability of, and protections afforded to, American citizens captured abroad.

### Evolution

During peacetime and wartime, all members of the United States Armed Forces risk capture and detention by hostile forces. Despite the many innovative technological advancements now employed for force protection, personnel still remain the most vulnerable asset in the warfighting arsenal. The increasing frequency of deployments in support of operations worldwide exposes DOD, United States Government (USG) employees, and civilian contractors to asymmetric threats determined to capture and exploit American citizens for military, political, or economic gain. A brief examination of history reveals America's significant contribution to the international and domestic laws that govern the humane treatment of captured personnel today.<sup>9</sup>

The treatment of captured enemy forces throughout history directly reflects the political and socio-cultural environment of the period. The evolution of the nature and prosecution of warfare caused a corresponding shift in the role of captured resources.

During the early seventeenth century, *jus gentium* prescribed that captured enemy personnel or materiel transferred ownership directly to the captor. Soldiers and sailors, if not killed immediately after capture, transitioned to the role of slave laborers. As conventional warfare evolved in European nations, particularly England and France, advocates called for civilized treatment of enemy captives. Subsequently, military personnel engaged in traditional force-on-force battle could expect reasonably civilized treatment after capture. The American Revolution introduced a unique challenge to the established international customs as American soldiers employed guerrilla warfare tactics in an insurgent-style uprising against the British government. Captured American soldiers and sailors were harshly treated, physically abused, or executed as common criminals.<sup>10</sup>

Unfortunately, England set the standard of behavior for the American soldiers, as witnessed later in the Civil War. The blatant abuse and neglect of soldiers in internment camps outraged the American public and convinced President Abraham Lincoln to enlist the expertise of Columbia University Professor Francis Lieber to draft regulatory directives. "Issued on April 24, 1863, as United States War Department General Order 100, 'Instructions for the Government of Armies of the United States in the Field,' the 'Lieber Code' was the first uniform code on treatment of captured soldiers and was a milestone in the history of war."<sup>11</sup> The Lieber Code contained, but is not limited to, the following guidance:

No belligerent has the right to declare that he will treat every captured man in arms...as a brigand or a bandit.

A prisoner of war is subject to no punishment for being a public enemy, nor is any revenge weakened upon him by the intentional infliction of any suffering, or disgrace, by cruel imprisonment, want of food, by mutilation, death, or any other barbarity.

A prisoner of war remains answerable for his crimes committed before the captor's army or people (for crimes) committed before he was captured, and for which he has not been punished by his own authorities.

A prisoner of war...is the prisoner of the government and not of the captor.

Prisoners of war are subject to confinement or imprisonment such as may be deemed necessary on account of safety, but they are to be subjected to no other intentional suffering or indignity.

A prisoner of war who escapes may be shot, or otherwise killed in flight; but neither death nor any other punishment shall be inflicted on him for his attempt to escape, which the law of order does not consider a crime. Stricter means of security shall be used after an unsuccessful attempt of escape.

Every captured wounded man shall be medically treated according to the ability of the medical staff.<sup>12</sup>

The standards and principles contained in the Lieber Code later served as the groundwork for rules guiding the conduct of armed hostilities between sovereign nations, also known as the law of war or LOAC.

LOAC consists of, "...customary international law arising out of the conduct of nations during hostilities and binding upon all nations, and treaty laws arising from international treaties and only binds those nations that have ratified a particular treaty."<sup>13</sup> LOAC treaty law contains agreements negotiated in the Netherlands at the Hague Peace Conferences of 1899, 1907, and 1914 and in Switzerland at the Geneva Conferences of 1864, 1929, 1949, and 1977. The Lieber Code, resurrected at the 1874 conference in Brussels, guided the discussions of the twenty-six member 1899 Hague Conference. The Hague and Geneva Conferences produced conventions designed to provide two state actors with minimum standards of acceptable and reciprocal conduct on the battlefield and in captivity during an international armed conflict. While the resulting Hague Regulations (HRs) center around lawful and illegal "means and

methods” of conducting warfare, the Geneva Conventions outline the rights and protections afforded to military and civilian personnel operating within a combat zone.<sup>14</sup> As the recognized foundation for American behavior in warfare, one must examine the principles contained in the Conventions and the applicability to asymmetric warfare.

### The Geneva Conventions

The 1864 Geneva Conference formalized protections for wounded soldiers and sailors and included the creation of the International Red Cross. *The Convention for the Amelioration of the Wounded in Time of War* provided for “...immunity from capture and destruction of establishments for the sick and wounded and their personnel; impartial reception and treatment of combatants; protection of civilians giving aid to the wounded; and recognition of the Red Cross as a means of identifying persons and equipment covered by the agreement.”<sup>15</sup> The subsequent conference in 1929 introduced *The Convention Relating to the Treatment of Prisoners of War* in an effort to create a legally binding set of standards between the participating nations for conduct outside of the main battlefield.

As with all international agreements, a state may be a party to the proceedings but not bound to the treaty until obtaining a signature, or interim acceptance, and final ratification, or official acceptance, of some or all of the draft provisions. An individual state may sign an agreement, with reservations, but fail to ever achieve ratification, as demonstrated by the United States in the case of the 1929 prisoner convention. The blatant disregard for prisoner health and safety during the Second World War resulted in a reevaluation and reaffirmation of the 1929 Convention’s requirements. The 1949 Geneva Conference developed four agreements including, but not limited to, the

*Convention Relative to the Treatment of Prisoners of War (GPW)* and the *Convention for the Protection of Civilian Persons in Time of War (GC)*.<sup>16</sup> Additionally, in 1979, *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflict (Protocol I)* and *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflict (Protocol II)* provide guidance to address the changing nature of conflict throughout the world. *Protocol III*, introduced in 2005, led to the addition of another distinctive protected emblem. Though the four Conventions achieved both signatory and ratification status, the United States did not ratify Protocols I and II. "On January 29, 1987, President Ronald Reagan argued that US repudiation of the Additional Protocols was an important move against 'the intense efforts of terrorist organizations and their supporters to promote the legitimacy of their aims and practices.'"<sup>17</sup> Although all four of the Conventions and the three Protocols are critical to the well-being of personnel in wartime, the GPW and Protocol I remain the most contentious in light of today's security environment.

The GPW outlines the rights, responsibilities, and protections afforded to prisoners of war (POW) regardless of race, nationality, or political or religious belief and "...is an agreement between nations; consequently, a PW cannot renounce the rights secured for him by the GPW (Article 7) and/or the duties assigned to him (Articles 49-57)..."<sup>18</sup> Divided into six sections, the GPW provides specific guidelines for both the captor and the POW throughout the stages of the captivity cycle. One of the key areas of controversy surrounding the GPW, particularly in view of current events in Afghanistan and Iraq, involves the determination of combatant status and eligibility for

POW rights and protections. "The war on terrorism has blurred the line separating renegade criminals and terrorists, who have no legal protections, from regular uniformed troops of nations at war, who have special rights specified in the 1929 and 1949 Conventions."<sup>19</sup>

### Combatant Status – Why Does It Matter?

The question of status is critical "because it will govern...mode of life in captivity. The Geneva Convention and international law provides certain safeguards for the man who has the 'status' of POW, guarantees various privileges during captivity and generally assures his well-being."<sup>20</sup> During captivity, personnel remain subject to the military laws of their own country as well as those of the enemy government. A captive can be held accountable for criminal acts committed prior to capture and throughout the detention period. First introduced in the 1907 HR, a combatant is an individual authorized "...by competent authority of a Party to engage directly in armed conflict."<sup>21</sup> Combatants are subdivided into regular and irregular forces. Regular forces include a nation's armed forces and any attached militia or volunteer forces. Irregular forces include members of militia or volunteer corps groups that are not connected to the regular armed forces, including organized resistance movements. Additionally, Protocol I, Article 43 "Armed Force," states that:

The armed forces of a Party to a conflict consist of all organized armed forces, groups, and units which are under a command responsible to that Party for the conduct of its subordinates, even if that Party is represented by a government or an authority not recognized by an adverse Party. Such armed forces shall be subject to an internal disciplinary system which, inter alia, shall enforce compliance with the rules of international law applicable in armed conflict. Members of the armed forces to a Party to a conflict...are combatants, that is to say, they have the right to participate directly in hostilities.<sup>22</sup>



To secure combatant status and the associated protections provided under the Conventions, the irregular forces must be engaged in an international armed conflict and meet all of the following criteria provided in GPW Article 4A(2)(a-d): be under the command of a person responsible for his or her subordinates; have a fixed distinctive symbol or insignia recognizable from a distance; carry arms openly; and conduct operations in accordance with LOAC.<sup>23</sup> Combatants engaged in evasion or escape activities may don enemy clothing or feign civilian status without retribution under the condition that the evader does not attack the adversary or engage in military operations. Protocol I, Article 44 “Combatants and Prisoners of War,” provides additional guidance to maintain combatant status:

In order to promote the protection of the civilian population from the effects of hostilities, combatants are obliged to distinguish themselves from the civilian population while they are engaged in an attack or in a military operation preparatory to an attack. Recognizing, however, that there are situations in armed conflict where, owing to the nature of the hostilities an armed combatant cannot so distinguish himself, he shall retain his status as a combatant, provided that, in such situations, he carries his arms openly: during each military engagement, and during such time as he is visible to an adversary while he is engaged in a military deployment preceding the launching of an attack in which he is to participate.<sup>24</sup>

Although the term “belligerent” is used in the HRs, it is interesting to note that the terms “unlawful belligerent” and “unlawful or unprivileged enemy combatant” do not appear in the HRs, Conventions, or Protocols but are now commonly used to describe combatants that lose their protected status or civilians who do not, or no longer, fall under the combatant category. The term unlawful enemy combatant is often applied to combatants who do not comply with the four customary requirements, individuals who directly engage in combat operations without authorization, and noncombatants who misuse their protected status to participate in armed conflict.<sup>25</sup> The Military

Commissions Act (MCA) of 2006 defines an unlawful enemy combatant in the context of the WOT as:

A person who has engaged in hostilities or who has purposefully and materially supported hostilities against the United States or its co-belligerents who is not a lawful combatant (including a person who is part of the Taliban, al Qaeda, or associated forces); or a person who, before, on, or after the date of the enactment of the Military Commissions Act of 2006, has been determined to be an unlawful enemy combatant by a Combatant Status Review Tribunal (CSRT) or another competent tribunal established under the authority of the President or the Secretary of Defense.<sup>26</sup>

Terrorists and insurgents adamantly assert the legitimacy of their cause and seek combatant status in conflicts against state adversaries, thus avoiding civil criminal prosecution for killing enemy military and civilian personnel:

Unlawful combatants do not qualify for prisoner of war status. Their situation upon capture by the enemy is covered by the Fourth (Civilian) Geneva Convention if they fulfill the nationality criteria and by the relevant provisions of the Additional Protocol I, if ratified by the detaining power. This protection is not the same as that afforded to lawful combatants. To the contrary, persons protected by the Fourth Convention...may be prosecuted under domestic law for directly participating in hostilities. They may be interned for as long as they pose a serious security threat, and, while in detention, may under specific conditions be denied certain privileges under the Fourth Geneva Convention. They may also be prosecuted for war crimes and other crimes and sentenced to terms exceeding the length of the conflict..<sup>27</sup>

One could argue that, in addition to failing to meet the four customary criteria, terrorist and insurgent groups do not have authorization from a competent authority, do not maintain the required “state” status for recognition by the Conventions, and are not signatories to the Conventions.<sup>28</sup> The protections afforded by the Conventions, as originally stipulated, apply only to members of “state” entities that are bound to, and willing to abide by, the agreements. Protocol I specifically prohibits the use of terrorist tactics, in particular “...acts or threats of violence the primary purpose of which is to

spread terror among the civilian population... persons suspected of such acts are liable for criminal prosecution.”<sup>29</sup>

Also of note, the term “detainee,” or “any person captured, detained, held, or otherwise under the control of DOD personnel (military or civilian),”<sup>30</sup> is also commonly applied to the captured enemy WOT personnel. The use of detainee in this new wartime context creates confusion since it is already commonly used to describe an individual involved in a peacetime detention situation.

If an individual’s status is in doubt, GPW Article 5 discusses the use of tribunals to determine combatant status but,<sup>31</sup> much to the consternation of the legal community, does not specify whether civilian or military jurisdiction takes precedence in convening the proceedings. In conjunction with the provisions of GPW Article 5, Protocol I Articles 45 and 75 also address the course of action to determine questionable combatant status and the stipulation for release with minimum delay.<sup>32</sup> As per the MCA, the CSRTs currently serve as the sole designated entity for WOT combatant determination.

### Noncombatants and Civilians

If a detainee fails to attain combatant status, he or she is considered a civilian. Noncombatants include civilians, civilians accompanying military forces, combatants who are unable to participate in the hostilities such as POWs and the wounded or sick, and retained personnel including military medics and chaplains. Retained personnel, while not considered POWs, warrant the rights and protections of the Conventions.<sup>33</sup> Despite the special provisions for retained personnel in the Conventions, medics and chaplains historically receive the same harsh treatment and sub-standard living conditions given to combatant. The DOD’s push to outsource and privatize many of the

military's support functions resulted in an increased number of civilian governmental employees and contractors working on or near the battlespace who, though classified as noncombatants, are entitled to POW status per GPW, Article 4A(4). Media correspondents that travel with military units, referred to during the WOT as "embedded reporters," are also granted POW status and must carry the Geneva Conventions Identification Card. Journalists operating in the conflict zone, but not assigned to military units, are considered civilians under Protocol I, Article 79 "Measures of Protection for Journalists" and do not warrant POW status. Additionally, members of non-governmental or private voluntary organizations are not entitled to POW status but are increasingly falling into enemy hands with little or no training on how to deal with captivity situations. Unfortunately, the authors of Protocol I, II, and the four Conventions never envisioned the asymmetric threats that American citizens face today.<sup>34</sup>

While adept at countering conventional state militaries that abide by LOAC standards, America fails to properly understand the nature of the asymmetric threat and the adversary's ability to manipulate the operational environment. Identification and comprehension of the enemy and the environment are vital in adjusting to both the unpredictable combat conditions encountered throughout the battlespace and the atypical treatment received while held in a wide range of captivity situations.

### Asymmetric Capture Situations

As the United States increases its forward posture and presence to pursue security and stability operations worldwide, one must consider the ability of the Conventions to protect American citizens in future security environment. The lack of a defined battlespace in the WOT, and the evolving nature of the threat, increases the

opportunities for the United States personnel to fall into capture situations not addressed by the Conventions and the Protocols. Hostile governments that detain American citizens during “peacetime” are also not required, per the GPW criteria, to extend special rights and privileges to “traditional” detainees. Peacetime government detentions, however, generally receive greater international scrutiny and failure to provide cursory protections can lead to severe political and economic repercussions. Along similar lines, terrorists and insurgents generally have not afforded their hostages the rights and protections of the GPW and GC.<sup>35</sup>

#### Traditional Detainees

During peacetime, captives become “traditional” detainees who are subject to the local laws of the captor and authorized to use force only in self-defense. The detainee is held in custody for alleged violations of local or international laws, even if the activities occurred under the auspices of a United Nations Resolution or other state-sanctioned military operation. In the performance of official peacetime duties, DOD personnel may purposefully or inadvertently violate the sovereignty of another country.<sup>36</sup> In July 1995, China detained Colonel Joseph Chan and Captain Dwayne Florenzie, attaches assigned to the United States Consulate General’s office in Hong Kong, for allegedly entering into a restricted area located within the vicinity of Beijing and photographing the activities of a sensitive military exercise. International media coverage and extensive diplomatic efforts convinced the Chinese government to release both officers after a brief detention. Similarly, China detained the twenty-four, multi-Service crew members of an American Navy EP-3 surveillance aircraft that collided with a Chinese F-8 fighter and eventually landed on Chinese soil in April 2001. China released the crew after

twelve days of intensive diplomatic negotiations and international scrutiny. In both detention situations, China openly acknowledged the detention of DOD personnel and conducted formal negotiations with American political officials to secure the release. Although subjected to interrogations and varying degrees of mental and physical distress, all of the detainees returned to American control relatively unharmed.<sup>37</sup>

Occasionally, a hostile government will detain personnel without formal notification to the captive's government. In June 2003, Iran detained four West Virginia National Guard soldiers, one United States Army contractor, and several foreign nationals traveling in a boat on the Shatt Al Arab River in support of Operation IRAQI FREEDOM. Unbeknownst to the United States, Iran interrogated and released the crew after twenty-nine hours of detention.<sup>38</sup> The potential political, economic and almost certain military fallout of detaining American citizens may have motivated Iran to avoid official notification and quickly release the captives.<sup>39</sup>

As a "blue helmet" United Nations Force member or "non-blue helmet" United Nations Expert on Mission, the captive is immune from detention under the *1946 Convention on Privileges and Immunity for United Nations* and authorized to use force in self-defense but not for evasion or rescue efforts. If captured while engaged in a state-sponsored military action that is not supported by the United Nations, the detainee lacks protected legal status and is not authorized to use force during evasion or rescue attempts.<sup>40</sup> Yugoslavia is an unusual case of indigenous conflict in which the United States participated as a third party under the auspices of the United Nations and the North Atlantic Treaty Organization. In 1999, Federal Yugoslavian Forces captured three American Army soldiers that strayed into Macedonian territory. Although all three

soldiers served under Expert on Mission status, the United States classified the troops initially as detainees and later declared that the troops warranted POW classification. After thirty-two days of captivity, during which the soldiers endured interrogations and physical mistreatment, American Reverend Jesse Jackson negotiated the formal release with Serbian officials.<sup>41</sup>

### Hostages

Finally, if captured by a non-governmental entity or terrorist organization and held as leverage in the pursuance of a politically-motivated objective, the individual is considered a hostage and authorized to use force only in self-defense. Although Protocols I and II condemn the taking of hostages for any reason, neither document stipulates any protection mechanism or expected minimum standards of treatment for the detainee or hostage.<sup>42</sup> General Mohammed Farah Aidid hoped to secure formal recognition as the leader over Somalia's collection of warring tribal factions in the early 1990s. The well-documented 1993 shutdown of Blackhawk helicopter pilot, United States Army Chief Warrant Officer 3 Michael Durant, provided Aidid with an opportunity to gain recognition from the United States government. Initially, local Aidid sympathizers held Durant hostage in the hopes of collecting a ransom, before turning him over for detention under the local militia. Durant eventually came into the custody of Aidid who, desiring to attain political recognition from the United States, conferred POW status, rights, and privileges onto the injured pilot. In the span of a few hours, Durant unknowingly transitioned from hostage to detainee to POW.<sup>43</sup>

In its present form, the Conventions do not adequately address the needs of detainees and hostages or provide a mechanism for sovereign states to prosecute non-

state transnational actors for criminal acts. Although the legal community adopted the “International Convention Against the Taking of Hostages” in 1979, subsequently supported under U.S. law, 18 USC 1203: “Act for the Prevention and Punishment of the Crime of Hostage-Taking” in 1984, many legitimate governments do not have the capability or resources to ensure the safety of foreign nationals living and working within their borders. Americans supporting Operation IRAQI FREEDOM face the possibility of capture and execution by Iraqi extremists. While the United States will make every effort to secure the return of its citizens, official government policy prevents the making of concessions to terrorists. The international community may need to reevaluate the rights, protections, and restrictions contained within the Geneva Conventions. A potential amendment of the Conventions would consequently impact America's domestic military law.

#### Current United States Policy

The 2006 MCA is an attempt to bridge some of the existing gaps in international humanitarian law created by asymmetric warfare, in particular, against extremist groups that utilize terrorist tactics. Although the broad language provides a great deal of latitude for pursuing an ever-changing enemy, it also creates many challenges for the international legal community. Terrorists, customarily considered criminals prosecuted under civilian criminal law, now fall under the category of unlawful enemy combatants subject to the proceedings of a military commission. Under the provisions relating to military commissions, the detainees could not invoke the protection of the Conventions or submit a writ of habeas corpus, and were subject to relaxed rules of evidence.<sup>44</sup> The assertion that enemy militants captured in the WOT do not merit the legal status of



POWs, combined with the practice of prolonged detainee detention in locations such as Guantanamo Bay, conflicted with the stated desire to uphold the principles of the Conventions and possibly contributed to the political pressure that led to the signing of the two Executive Orders. American military lawyers must balance the obligation to ensure proper due process for the detainee with the desire to prevent a potential adversary from returning to the battlefield. "...[T]here is also significant security risk when letting prisoners of terror war go free... a risk that these individuals will return to their terror cells, possibly with valuable information on coalition armies, their methods and bases."<sup>45</sup> Rampant corruption within many foreign legal systems contributes to the hesitation of returning detainees to their home countries for prosecution.

The unintended consequence of America's current treatment of the WOT detainees is potential backlash against future American POWs, detainees, and hostages. The United States appears hypocritical if it indefinitely detains foreign nationals without providing for an established due process, yet demands the immediate release of captured American citizens. Although the current blanket policy of denial of lawful combatant status to some WOT detainees sets a negative precedence for denial of combatant status to American personnel in the future, the provisions for protection that keep within the spirit of the Conventions will hopefully engender some reciprocity in America's enemies.

Good treatment of prisoners of war also makes a profound impression in enemy countries. Even if it is not advertised the true facts soon reach the families of enemy prisoners; through these families they will reach other nationals. Good treatment can also be mentioned in radio broadcasts to enemy countries, and as the facts are true, this kind of propaganda cannot be reversed later. On the other hand reprisals against enemy prisoners may easily be ineffective; the enemy may be a country which does not care much for individual lives of those who have been captured...

Atrocities embitter, and threats frighten an enemy population into prolonged resistance, while decent treatment will break the wall of fanaticism and encourage surrender.<sup>46</sup>

Political and military efforts in the WOT must influence not only the members of the terrorist organization, but the citizens and political leaders of the countries that support the terrorists.

### Current International Policy

The increasing succession of assaults by transnational terrorist organizations employing asymmetric tactics and techniques compels the United States to reexamine the traditional perceptions of threats and the need for worldwide cooperation and assistance. The unpredictable and violent attacks on unsuspecting civilian personnel, facilities, and infrastructure cause severe political, economic, and social disruptions that frequently affect the entire international community. "Respect for the rule of law, international conventions, and treaty obligations will not make us weak, it will engender international cooperation and good will that make it impossible for extremist movements to prosper."<sup>47</sup> Current American policy on the classification and detention of WOT detainees is a source of friction between many of its allies.

While states have an incentive to have the 'moral high ground' in relation to their adversary, they also need to be seen as acting legally and morally for the sake of their allies. While the United States is fully capable of acting on its own, it desires to be seen as acting with the approval of its allies in the conflict. Therefore, it has the incentive to listen to the concerns of its allies regarding the status of the prisoners and adhering to the Convention. Eventually, the US did partially change its position when it was announced on February 7, 2002, that the Taliban forces would be treated in accordance with the Third Geneva Convention...but that they would still not be considered POWs as they did not meet the criteria... Al-Qaeda prisoners would still not be regarded as falling within scope of the Conventions at all.<sup>48</sup>

Unlike the United States, the United Kingdom, Canada, Australia, New Zealand, and Israel<sup>49</sup> automatically confer temporary POW status on an individual basis until a competent tribunal completes the official combatant determination process:

With the notable exception of the detainees at present being held at Guantanamo Bay, Cuba, by the United States, State practice as regards GC III Article 5 (2) has generally shown a willingness to accord both treatment and status of prisoners of war to captured persons who have taken part in hostilities, even where, strictly speaking, the persons may not fit easily into the Article 4 categories.<sup>50</sup>

Although many nations publically pledged diplomatic, economic, and military support for America's WOT, some do not share the belief that a state should declare war against an asymmetric tactic. "...the public opinion of many Germans who did not believe that it was feasible to 'win a war' against terrorism by using military means."<sup>51</sup> Germany, and other nations that have long histories of dealing with internal and external extremist groups that use terrorism as a tactic, believe that the issue falls more appropriately within the realm of law enforcement.

A criminal law enforcement approach to terrorism has many inherent advantages that promote efficiency. By treating terrorist like criminals, we stigmatize them in their community, while simultaneously validating our own authority. Open and public trials allow the community to see the terrorist for the criminal he is, and successful prosecutions give them faith the government is protecting them. Judicial review ensures that the methods used are in accordance with the law.<sup>52</sup>

As with America's "war on drugs," the WOT creates a situation in which international military forces must determine how to apply LOAC standards against non-state actors. Since it is difficult to determine the criteria for cessation of hostilities, America and its Coalition partners need more effective and efficient guidance on how to prosecute the enemy detainees.

### Proposed Way Ahead

The United States maintains two objectives for the classification and treatment of captured enemy personnel: affirm America's enduring commitment to the principles of the Geneva Conventions; and treat all captured enemy personnel humanely and consistent with the principles of the Conventions and American values.<sup>53</sup> The four Conventions and three Protocols, though not constructed to completely address the issues arising during the WOT, contain many invaluable elements that remain relevant to today's asymmetric battlefield. To achieve America's objectives with regard to captured enemy personnel, while simultaneously reducing the risk to American citizens operations overseas, one can apply the Conventions and Protocols as currently written and amend the national policy, to include:

1. Determine the criteria for cessation of the current phase of the WOT operations in Iraq and Afghanistan; prepare a plan to gradually transition the legal prosecution of detained terrorists from the military to a civilian law enforcement focus;
2. Discontinue use of the term "unlawful enemy combatant" in conjunction with extremist groups that use, or support the use of, terrorism and apply the term "criminal;"
3. Discontinue the blanket determination policy and evaluate combatant status on a case-by-case basis through military tribunals;
4. Determine captured enemy personnel status within 30 days of capture; if combatant status conferred, turn the enemy combatant over to military authorities for a continued and defined period of detention under the provisions of the GPW; if combatant status denied, turn the "criminal" over to

the civilian authorities for processing and prosecution through the United States federal legal system;

5. Ensure compliance with the Executive Order<sup>54</sup> to close the Guantanamo Bay detention facility; support Department of State and Department of Justice efforts to secure alternate foreign or United States domestic sites to relocate the detainees;
6. Reactivate the use of military commissions as an option for prosecution of enemy combatants who violate the LOAC standards; and
7. Consider the creation of an international civilian legal forum to advise on the long-term disposition of terrorists that cannot be properly prosecuted under the federal rules of evidence applicable in United States federal criminal courts, but are deemed a continued threat to United States national security.

These considerations are legal, ethical, maintain domestic and international support, and further America's desire to promote our national values at home and abroad. The unconventional nature of extremist groups that employ terrorist tactics inherently requires the DOD, Department of Justice, Department of State, and other interagency members to develop a new perspective on combating adversaries around the world. America must gain a greater understanding of the nature of the threat to cultivate the capabilities needed to achieve full spectrum dominance. To attain the necessary level of understanding, the DOD and USG must overcome internal and interagency cultural differences and parochial attitudes to facilitate communication and collaboration.

The criminal prosecution of WOT detainees poses unique challenges due to the involvement of sensitive collection assets and methods. Public Law 96-456 “Classified Information Procedures Act”<sup>55</sup> and the Federal Judicial Center’s “Terrorism-Related Cases: Special Case-Management Challenges, Problems and Solutions” report offer guidelines and practical solutions for ensuring proper legal proceedings while protecting classified information:

Cases related to terrorism often pose unusual and challenging case management issues for the courts. Evidence or arguments may be classified; witnesses or the jury may require special security measures; attorneys’ contacts with their clients may be diminished; other challenges may present themselves. The purpose of this Federal Judicial Center resource is to assemble methods federal judges have employed to meet these challenges so that judges facing the challenges can learn from their colleagues’ experiences.<sup>56</sup>

## Conclusion

The issue of combatant determination reaches far beyond the detainees awaiting final disposition at Guantanamo Bay. The recommendations of the Special Interagency Task Force on Detainee Disposition, and President Obama’s selection of an appropriate course of action, affect American citizens operating now, and in the future, in the fluid capture situations worldwide. The United States, as a world leader, must maintain the moral high ground and repair its political reputation without weakening the military’s ability to deter enemy aggression against vital national interests. If America expects humane treatment and expeditious judicial action for its citizens classified as POWs, traditional detainees, and hostages, it must integrate the standards of due process into its application of the Geneva Convention requirements for captured enemy personnel. One can only hope that the Special Interagency Task Force will not miss this

opportunity for America to once again shape the international and domestic policies that govern the humane treatment of captured personnel in the asymmetric environment.

## Endnotes

<sup>1</sup> President George W. Bush, "Bush Commemorates U.N. Day to Support Torture Victims," 28 June 2004, <http://www.america.gov/st/washfile-english/2004/June/20040628140800LShsaN0.3632013.html> (accessed 23 February 2009).

<sup>2</sup> President George W. Bush, "Address to a Joint Session of Congress and the American People," 20 September 2001, <http://www.whitehouse.gov/news/releases/2001/09/print/20010920-8.html> (accessed 13 January 2009).

<sup>3</sup> President George W. Bush, "Presidential Address to the Nation," 7 October 2001, <http://www.whitehouse.gov/news/releases/2001/10/print/20011007-8.html> (accessed 13 January 2009).

<sup>4</sup> U.S. Air Force Judge Advocate General School, *The Military Commander and the Law* (Alabama: AFJAGS Press, 2000), 591-592.

<sup>5</sup> James R. Schlesinger, et. al., *Final Report of the Independent Panel to Review DoD Detention Operations* (Arlington: U.S. Department of Defense, 24 August 2004), <http://www.defenselink.mil/news/Aug2004/d20040824finalreport.pdf> (accessed 8 January 2009). This document also references Department of Defense Directive 5100.77, *DoD Law of War Program* and Chairman of the Joint Chiefs of Staff Instruction 5810.01B, *Implementation of the DoD Law of War Program*, which provide the high-level, overarching policy and responsibilities guidance.

<sup>6</sup> Although the United States now relies on Allied and Coalition partners, this study will only address American citizens in asymmetric capture situations.

<sup>7</sup> President Barack Obama, "Executive Order on Review of Detention Policy Options," 22 January 2009, <http://www.montevideo.usembassy.gov/usaweb/2009/09-028bEN.shtml> (accessed 3 February 2009).

<sup>8</sup> President Barack Obama, "Executive Order on Closure of Guantanamo Bay Detention Facility," 22 January 2009, <http://www.america.gov/st/texttrans-english/2009/January/20090122152523eaifas0.8497888.html> (accessed 3 February 2009).

<sup>9</sup> Laura M. Ryan, *Return With Honor: Code of Conduct Training in the National Military Strategy Security Environment*, Thesis Project (Monterey, CA: Naval Postgraduate School, September 2004), 1-2.

<sup>10</sup> Veterans Administration – Office of Planning and Program Evaluation, *POW: Study of Former Prisoners of War* (Washington, DC: U.S. Government Printing Office, 1980), 23-25.

<sup>11</sup> *Ibid.*, 26.

<sup>12</sup> Ibid., 25.

<sup>13</sup> U.S. Air Force Judge Advocate General School, *The Military Commander and the Law*, 596.

<sup>14</sup> Ibid., 596-597.

<sup>15</sup> Veterans Administration – Office of Planning and Program Evaluation, *POW: Study of Former Prisoners of War*, 27.

<sup>16</sup> Ibid., 27-28. The other Conventions and Protocols include Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in the Armed Forces in the Field; Geneva Convention for the Amelioration of the Condition of the Wounded, Sick, Shipwrecked Members of the Armed Forces at Sea; Annex I (to the Protocol I): Regulations concerning Identification (as amended on 6 June 1997 and 30 November 1993); Annex II (to the Protocol I): Identity Card for Journalists on Dangerous Professional Missions; and Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Adoption of an Additional Distinctive Emblem (Protocol III), 8 December 2005.

<sup>17</sup> Stephanie Carvin, "The Applicability of the Geneva Convention to a War on Terror," (2002), <http://www.cda-cdai.ca/symposia/2002/carvin.html> (accessed 4 October 2008).

<sup>18</sup> U.S. Department of the Army, *Prisoner of War Resistance*, U.S. Army Field Manual 21-78 (Washington DC: U.S. Department of the Army, 1981), 11.

<sup>19</sup> David Wood, "U.S. POWs Could Face Brutal Treatment in Iraq War," *Newhouse News Service*, 21 March 2003, <http://www.newhousenews.com/archive/wood032103.html> (accessed 03 March 2004).

<sup>20</sup> A.J. Barker, *Prisoners of War*, (New York, NY: Universe Books, 1975), 18.

<sup>21</sup> U.S. Department of the Air Force, *International Law - The Conduct of Armed Conflict and Air Operations*, U.S. Air Force Pamphlet 110-31 (Washington, DC: U.S. Department of the Air Force, 19 November 1976), 3-1.

<sup>22</sup> *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, 8 June 1977, <http://www.icrc.org/ihl.nsf/CONVPRES?Openview> [01 December 2008].

<sup>23</sup> Geneva Conventions, *Geneva Convention (III) Relative to the Treatment of Prisoners of War*, 12 August 1949, <http://www.icrc.org/ihl.nsf/CONVPRES?Openview> (accessed 01 December 2008).

<sup>24</sup> Protocol I, 20.

<sup>25</sup> AFP 110-31, 3-3.

<sup>26</sup> *Military Commissions Act of 2006*, Public Law 109-366, 17 October 2006, [http://www.loc.gov/rr/frd/Military\\_Law/pdf/PL-109-366.pdf](http://www.loc.gov/rr/frd/Military_Law/pdf/PL-109-366.pdf) (accessed 25 November 2008).



<sup>27</sup> International Committee of the Red Cross, "The Relevance of IHL in the Context of Terrorism," 21 July 2005, <http://www.icrc.org/Web/eng/siteeng0.nsf/html/terrorism-ihl-210705> (accessed 2 October 2008).

<sup>28</sup> Laura M. Ryan, *Return With Honor: Code of Conduct Training in the National Military Strategy Security Environment*, 13.

<sup>29</sup> *Ibid.*, 3.

<sup>30</sup> U.S. Department of Defense, *DOD Intelligence Interrogations, Detainee Debriefings, and Tactical Questioning*, Department of Defense Directive 3115.09 (Washington, DC: Department of Defense, Intelligence, 2008), <http://www.dtic.mil/whs/directives/corres/pdf/311509p.pdf> (accessed 7 November 2008).

<sup>31</sup> Geneva III. GPW, Article 5: The present Convention shall apply to the persons referred to in Article 4 from the time they fall into the power of the enemy and until their final release and repatriation. Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories of the present Convention until such time as their status has been determined by a competent tribunal.

<sup>32</sup> *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, 8 June 1977, <http://www.icrc.org/ihl.nsf/CONVPRES?Openview> (accessed 01 December 2008). Protocol I, Article 45 – Protection of persons who have taken part in hostilities: 1. A person who takes part in hostilities and falls into the power of an adverse Party shall be presumed to be a prisoner of war, and therefore shall be protected by the Third Convention, if he claims the status of prisoner of war, or if he appears to be entitled to such status, or if the Party on which he depends claims such status on his behalf by notification to the detaining Power or to the Protecting Power. Should any doubt arise as to whether any such person is entitled to the status of prisoner of war, he shall continue to have such status and, therefore, to be protected by the Third Convention and this Protocol until such time as his status has been determined by a competent tribunal. 2. If a person who has fallen in to the power of an adverse Party is not held as a prisoner of war and is to be tried by that Party for an offence arising out of the hostilities, he shall have the right to assert his entitlement to prisoner-of-war status before a judicial tribunal and to have that question adjudicated. Whenever possible under the applicable procedure, this adjudication shall occur before the trial for the offence. The representatives of the Protecting Power shall be entitled to attend the proceedings in which that question is adjudicated, unless, exceptionally, the proceedings are held in camera in the interest of State security. In such a case the detaining Power shall advise the Protecting Power accordingly. 3. Any person who has taken part in hostilities, who is not entitled to prisoner-of-war status and who does not benefit from more favourable treatment in accordance with the Fourth Convention shall have the right at all times to the protection of Article 75 of this Protocol. In occupied territory, an such person, unless he is held as a spy, shall also be entitled, notwithstanding Article 5 of the Fourth Convention, to his right of communication under that Convention. Protocol I, Article 75, Section 3 – Fundamental guarantees: Any person arrested, detained, or interned for actions related to the armed conflict shall be informed promptly, in a language he understands, of the reasons why these measures have been taken. Except in cases of arrest or detention for penal offenses, such persons shall be released with minimum delay possible and in any event as soon as the circumstances justifying the arrest, detention or internment have ceased to exist.

<sup>33</sup> AFP 110-31, 3-3.

<sup>34</sup> Laura M. Ryan, *Return With Honor: Code of Conduct Training in the National Military Strategy Security Environment*, 14-15.

<sup>35</sup> Laura M. Ryan, *Return With Honor: Code of Conduct Training in the National Military Strategy Security Environment*, 16.

<sup>36</sup> Gary Percival, psychologist with the Joint Personnel Recovery Agency, interview by author, WA, 16 December 2003.

<sup>37</sup> Ibid.

<sup>38</sup> Mike Cadle, "W.Va. Soldiers on OIF Mission Detained by Iran," *The On Guard*, August 2003.

<sup>39</sup> Laura M. Ryan, *Return With Honor: Code of Conduct Training in the National Military Strategy Security Environment*, 47.

<sup>40</sup> Percival.

<sup>41</sup> Ibid.

<sup>42</sup> Ibid.

<sup>43</sup> Laura M. Ryan, *Return With Honor: Code of Conduct Training in the National Military Strategy Security Environment*, 49.

<sup>44</sup> *Military Commissions Act of 2006*, 36-37.

<sup>45</sup> Carvin, "The Applicability of the Geneva Convention to a War on Terror," 5.

<sup>46</sup> A.J. Barker, *Prisoners of War*, 197.

<sup>47</sup> Michael German, "Squaring the Error," in *Law vs. War: Competing Approaches to Fighting Terrorism Conference Report*, ed. Shawn Boyne, Michael German, and Paul R. Pillar (Carlisle Barracks, PA: U.S. Army War College Strategic Institute, July 2005), 16.

<sup>48</sup> Carvin, "The Applicability of the Geneva Convention to a War on Terror," 7.

<sup>49</sup> Yasmin Naqvi, "Doubtful Prisoner-of-War Status," *International Review of the Red Cross*, Volume 84, Number 847, September 2002, <http://www.icrc.org/Web/Eng/siteeng0.nsf/html/5FLBZK> (accessed 1 December 2008).

<sup>50</sup> Ibid., 591.

<sup>51</sup> Shawn Boyne, "Preserving the Rule of Law in a Time of Terror: Germany's Response to Terrorism," in *Law vs. War: Competing Approaches to Fighting Terrorism Conference Report*, ed. Shawn Boyne, Michael German, and Paul R. Pillar (Carlisle Barracks, PA: U.S. Army War College Strategic Institute, July 2005), 18.

<sup>52</sup> German, "Squaring the Error," 14.

<sup>53</sup> Ari Fleischer, "Statement by the Press Secretary on the Geneva Convention," 7 May 2003, <http://www.whitehouse.gov/news/releases/2003/05/print/20030507-18.html> (accessed 17 October 2008).

<sup>54</sup> President Barack Obama, "Executive Order on Closure of Guantanamo Bay Detention Facility."

<sup>55</sup> *Classified Information Procedures Act*, Public Law 96-456, 15 October 1980, <http://www.intelligence.senate.gov/classifiedinformationprocedures.htm> (accessed 23 February 2009).

<sup>56</sup> Robert Timothy Reagan, *Terrorism-Related Cases: Special Case-Management Challenges, Problems and Solutions* (Washington, DC: Federal Judicial Center, 26 March 2008), 1, [http://www.fjc.gov/public/pdf.nsf/lookup/ts080326.pdf/\\$file/ts080326.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/ts080326.pdf/$file/ts080326.pdf) (accessed 25 November 2008).

